Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1434 and 88-1075

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,
v.
UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

ASSOCIATED BUILDERS AND CONTRACTORS, INC. and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,
v.
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE BUSINESS COUNCIL ON THE REDUCTION OF PAPERWORK AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

CLARK R. SILCOX *
STEELE & FORNACIARI
2020 K Street, N.W., Suite 850
Washington, D.C. 20006
(202) 887-1779
Attorneys for Business Council on the Reduction of Paperwork

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	2
PRELIMINARY STATEMENT	5
REASONS FOR GRANTING THE PETITION	6
I. Review Is Necessary To Resolve A Conflict Among The Circuits Over What Constitutes A "Collection Of Information" Under The PRA	10
II. Review Is Necessary To Resolve An Issue Of Major Economic Significance Concerning The Authority Of OMB To Reduce The Cost Of Federally-Required Recordkeeping Requirements	15
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Action Alliance of Senior Citizens v. Bowen, 846 F.2d 1449 (D.C. Cir. 1988), *pet. for cert. pending* (No. 88-849) 10, 11, 14
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15, 19
FTC v. Indiana Federation of Dentists, 106 S. Ct. 2009 (1986) 6
K mart Corp. v. Cartier, Inc., —— U.S. ——, 108 S.Ct. 1811 (1988) 19
United Steelworkers of America v. Pendergrass (USWA II), 819 F.2d 1263 (3rd Cir. 1987) 5
United Steelworkers of America v. Pendergrass (USWA III), 855 F.2d 103 (3rd Cir. 1988) 5, 10, 11, 13, 15
Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 6

Statutes and Regulations:

Federal Advisory Committee Act, 5 U.S.C.A., App. 2 § 1 *et seq.* (1967) 3
Federal Reports Act, 44 U.S.C. § 3501 *et seq.* (1976) 2
Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.* 3, 4
44 U.S.C. § 3501 7
44 U.S.C. § 3501(2) 14
44 U.S.C. § 3502(4) 12
44 U.S.C. § 3502(11) 12
44 U.S.C. § 3502(17) 12
44 U.S.C. § 3503 7
44 U.S.C. § 3504(a) 8, 10, 16, 19
44 U.S.C. § 3504(c) 8
44 U.S.C. § 3505(1) 7
44 U.S.C. § 3504(4) 7
44 U.S.C. § 3506(a) 8, 10, 19
44 U.S.C. § 3507(a) 4, 8, 9, 10, 19
44 U.S.C. § 3508 ..... 4, 8, 9, 10, 16, 19
44 U.S.C. § 3512 ..... 18, 19
44 U.S.C. § 3516 ..... 8, 19

TABLE OF AUTHORITIES—Continued

Page

44 U.S.C. § 3517 4
44 U.S.C. § 3518(a) 9, 10, 19
44 U.S.C. § 3518(e) 10, 16, 19

5 C.F.R.:

Section 1320 13
Section 1320.7(c) 13
Section 1320.7(c)(2) 14

29 C.F.R.:

Section 1910.1200(e)(2) 11
Section 1910.1200(e)(2)(i) 12
Section 1910.1200(g)(8) 12

Other Authorities:

S. Rep. No. 96-930, 96th Cong., 2d Sess. (1980) 4, 7, 13, 14, 16, 17, 18
H.R. Rep. No. 96-835, 96th Cong., 2d Sess. (1980) .. 13, 17
Paperwork Act Oversight: Internal Revenue Service Forms W-4 and W-4a, Hearing Before the Subcommittee on Federal Spending, Budget, and Accounting, Senate Committee on Governmental Affairs, S. Hrg. 100-75, 100th Cong., 1st Sess. (1987) (Statement of Wendy Gramm, Director OIRA) 16
Office of Management and Budget, Information Collection Budget of the United States Government (March 10, 1988) 7
G. Stigler, The Economics of Information and Information in the Labor Market in The Organization of Industry 171 and 191 (1968) 6
A.D. Little & Co., Study For The Internal Revenue Service On Taxpayer Paperwork Burden (August 31, 1988) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC. and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE BUSINESS COUNCIL ON THE REDUCTION OF PAPERWORK AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

The Business Council on the Reduction of Paperwork ("BCORP") respectfully submits this brief as amicus curiae in support of the petitions for writ of certiorari

filed by the petitioners, Elizabeth Dole, Secretary of Labor, and the Associated Builders and Contractors, Inc. and Construction Industry Trade Associations.[1] Pursuant to Supreme Court Rule 36.1, the parties have consented to the filing of this brief. BCORP has filed their written consents with the Clerk.

INTEREST OF THE AMICUS CURIAE

The Business Council on the Reduction of Paperwork ("BCORP") is a non-profit, non-partisan association whose basic purpose is to assist the federal government, business entities and not-for-profit research institutions in maximizing the value and meaningfulness of federally generated data and records, while minimizing the burden of federally sponsored reporting and recordkeeping. BCORP's membership consists of twenty-nine national and regional trade associations, and sixty individual business and educational organizations. Through its trade association members, BCORP reaches out to thousands of other small and large enterprises to inform and to involve them on issues involving the burden and practical consequences of regulatory reporting and recordkeeping requirements. Many BCORP members are adversely affected by this ruling.

BCORP is the successor to the Advisory Committee on Government Questionnaires which was originally organized in 1942 at the request of the Director of the Bureau of the Budget in response to the enactment of the Federal Reports Act, ch. 811, 56 Stat. 1078 (1942). The Advisory Committee was later renamed the Advisory Council on Federal Reports ("ACFR"), and following the

---

[1] This brief addresses only the question presented under the Paperwork Reduction Act which is the sole question addressed by the Secretary of Labor in the gaovernment's petition in No. 88-1434. It is one of four questions presented by Petitioners in No. 88-1075. Petitioners in 88-1075 raise additional questions for review which are not addressed by *amicus curiae* in this brief.

enactment of the Federal Advisory Committee Act in 1972 (86 Stat. 770), 5 U.S.C.A., Appendix 2 § 1 *et seq.* (1967), which terminated the existence of numerous federal advisory committees (such as ACFR) whose charters were not expressly renewed, ACFR reorganized as the Business Advisory Council on Federal Reports ("BACFR"). BACFR's stated purpose was to advise the Director of the Office of Management & Budget ("OMB") and the Comptroller General of the United States, consistent with their respective statutory responsibilities under the Federal Reports Act, in coordinating the information—collecting services of the federal agencies with a view to minimizing the burden upon business enterprises, reducing the cost of government, and improving the quality or federally sponsored data collection and recordkeeping programs. In 1986, the association's name was changed to BCORP to reflect the national mandate established by Congress to bring about the *reduction* of unnecessary paperwork. BCORP is now the single private organization devoted exclusively to this purpose.

BCORP's interest in the present dispute is more than academic. This is a case of enormous economic significance, not only to BCORP's membership, but to the commercial and research sectors of our economy and the public generally. The rule of law established by this case threatens to exempt from OMB review under the Paperwork Reduction Act of 1980 ("PRA") many unnecessary, federally mandated recordkeeping requirements with the effect of disrupting the Congressional goal of reducing paperwork burden. The court of appeals ruling lays open to challenge all OMB decisions under the PRA when those OMB decisions are based and articulated solely in terms of reducing paperwork burden. The ruling in this case will curtail, by judicial fiat, the congressional objective of *reducing* the burden of federally mandated recordkeeping and reporting by eliminating OMB clearance of agency rules and thus imposing costs on BCORP's mem-

bers and the nation's businesses that might have been avoided as Congress intended.

BCORP has another interest in this suit. One of the fundamental improvements which the PRA, 44 U.S.C. § 3501 *et seq.*, made to the old Federal Reports Act is the public participation provisions now codified in §§ 3507(a), 3508 and 3517 of Title 44 of the U.S. Code whereby the Director of the OMB must give interested agencies and perpersons a "meaningful opportunity to comment" before determining whether the "collection of information" by an agency is "necessary for the proper performance of the functions of the agency." As noted by the Senate Governmental Affairs Committee in the Senate Report accompanying S. 1411, which became the PRA, BCORP's predecessor-in-name:

> The Business Advisory Council on Federal Reports (BACFR) has monitored the operations of the Federal Reports Act throughout the Act's history. The Council stressed to the Committee the value of increased public awareness and participation. As a result of their comments on S. 1411, the Committee has taken additional steps to provide a meaningful opportunity for public involvement.

S. Rep. No. 96-930, 96th Cong., 2d Sess. 16 (1980). In this case, BCORP petitioned OMB to hold hearings on OSHA's Hazard Communication Standard ("HCS") to hear the views of the public on this significant new federal recordkeeping requirement, and OMB held hearings. BCORP, some of its members, OSHA, and other interested parties participated in those hearings and shared their views on the paperwork burden issue posed by the HCS as well as the revised HCS when it was extended to the non-manufacturing sector. In granting the motion of the United Steelworkers of America and Public Citizen, Inc. from which the present dispute arises, the Third Circuit effectively ruled that public hearings on the paperwork burden posed by the recordkeeping require-

ments of the revised HCS should never have been held at all.[2] This result undermines the nation's effort to involve both the public and the agencies in the paperwork reduction process so that all interested parties can evaluate the need for information and the cost attributable to collecting, maintaining and disseminating it.

BCORP submits this brief on behalf of all of its members as *amicus curiae* in support of the Petitions for Writ of Certiorari to inform the Court of the importance of the issue presented.

PRELIMINARY STATEMENT

Petitioners seek a writ of certiorari in connection with a decision of the Third Circuit Court of Appeals. *United Steelworkers of America v. Pendergrass ("USWA III")*, 855 F.2d 108 (3rd Cir. 1988). This case addresses the authority of OMB under the PRA to review whether an agency (OSHA) has met its responsibility under the PRA to reduce the burden of paperwork recordkeeping requirements imposed by the HCS. The impact of this case extends far beyond OSHA and the revised HCS which is the subject of this suit. It affects many other disclosure-oriented recordkeeping requirements which federal agencies are now promulgating and will likely promulgate in the future. First, the Third Circuit held that OMB "second-guessed" the "substantive policy decision making entrusted to [OSHA]," and lacked authority to do so. The holding is erroneous, and the logical extension of the court of appeals' reasoning is not limited to OSHA, but has significance for OMB review of all other agency actions under the PRA. Second, the Third Circuit held

---

[2] Like the Petitioner, amicus notes that the Paperwork Reduction Act issue was before the court on a motion to hold the Secretary of Labor in contempt of the Third Circuit's prior order in *United Steelworkers of America v. Pendergrass ("USWA II")*, 819 F.2d 1263 (3rd Cir. 1987) for submitting the revised HCS to OMB for review in the first place.

that the specific provisions of the HCS which were disapproved by OMB did not "require the collection of information" and therefore they were not subject to OMB review under the PRA. This holding is equally erroneous, and it threatens to eliminate from OMB review all federally mandated *recordkeeping* requirements simply because the data in the records may, but do not necessarily have to be reported back to a federal agency.

REASONS FOR GRANTING THE PETITION

Information is a valuable economic resource; it is valuable to government, business enterprises, workers, and consumers. Like any other economic resource, there is a cost in acquiring information, there is a cost in maintaining information, and there is a cost in distributing information. These costs naturally affect the cost of government, the cost of doing business, and the cost of bringing goods and services, public or private, to the public.[3]

Just as they would treat any other economic resource, businesses, workers, and consumers tend to acquire, distribute, and receive information in the most efficient manner they know.[4] In enacting the Federal Reports Act and the PRA, Congress recognized that the federal government should set efficiency in the collection, maintenance, and dissemination of information as a national

---

[3] This Court has recognized this fact in another context. *See FTC v. Indiana Federation of Dentists,* 106 S.Ct. 2009, 2019 (1986) ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost-justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market * * *"). *See also Virginia Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 763-65 (1976).

[4] G. STIGLER, THE ECONOMICS OF INFORMATION and INFORMATION IN THE LABOR MARKET in THE ORGANIZATION OF INDUSTRY 171 and 191 (1968).

objective when it was required by the federal government. 44 U.S.C. § 3501. The PRA itself set an immediate objective of *reducing* the existing burden of Federal collection of information within three years by twenty-five percent. 44 U.S.C. § 3505(1). The need for this legislation was a response to the finding of the Federal Paperwork Commission which estimated in 1977 that the cost of Federal Paperwork requirements then amounted to $100 billion a year, about $500.00 for every man, woman and child. S. Rep. 96-930, 96th Cong., 2d Sess. 3 (1980). The Paperwork Reduction Reauthorization Act of 1986 set a further goal of reducing the burden of Federal collections of information by at least 5 percent in each of fiscal years 1987, 1988 and 1989. 44 U.S.C. § 3505(4).

In its most recent report to the President, OMB estimated that the public will spend almost 2 billion hours in fiscal year 1988 complying with federal information collection requests.[5] Sixty-three percent of the burden falls on business and other institutions.[6] In the same report, OMB reported that in every year but fiscal year 1987 OMB has actually been able to reduce paperwork burden: from 1981-1987 OMB was able to reduce that burden by an aggregate of 560 million hours pursuant to its authority under the PRA.[7]

OMB, through its Office of Information and Regulatory Affairs (OIRA), is charged with the responsibility of administering the PRA. 44 U.S.C. § 3503. Additionally,

---

[5] Office of Management and Budget, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT 1 (March 10, 1988). The figure may actually be much higher. The I.R.S. recently released a report stating that the taxpayer paperwork burden alone was 5.3 billion hours. A.D. LITTLE & CO., STUDY FOR THE INTERNAL REVENUE SERVICE ON TAXPAYER PAPERWORK BURDEN (August 31, 1988).

[6] Office of Management and Budget, *id.* at 14.

[7] *Id.* at 4.

each federal agency is responsible for "complying with the information policies, principles, standards, and guidelines prescribed by the Director" of OMB. 44 U.S.C. § 3506(a). The Director of OMB is granted express authority to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. § 3516.

Within the framework of the PRA, it is initially the responsibility of each federal agency to determine the agency's "need for the information" and estimate the burden that will result from the information collection request. 44 U.S.C. § 3507(a). OMB then fulfills its statutory mission to minimize the cost of collecting, maintaining and disseminating information, under the statutory grant of authority contained in 44 U.S.C. §§ 3504(a), 3504(c), 3507(a) and 3508 by reviewing an agency's "information collection requests"; in other words, reviewing whether an agency has met its statutory responsibilities under the PRA:

> **§ 3504. Authority and functions of Director.**
>
> (a) The Director shall develop and implement * * * and oversee the review and approval of information collection requests, * * * The authority of the Director under this section shall be exercised consistent with applicable law.
>
> (c) The information collection request clearance and other paperwork control functions of the Director shall include—
>
> (1) reviewing and approving information collection requests proposed by agencies;
>
> (2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency.

§ 3507. Public information collection activities-Submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information—

* * * *

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

§ 3508. Determination of necessity for information; hearing

Before approving a proposed collection request, the Director shall determine whether the collection of information by an agency *is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.* Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency *is unnecessary, for any reason, the agency may not engage in the collection of the information.* (Emphasis supplied).

The relationship between a federal agency and OMB under the PRA is also set out in 44 U.S.C. § 3518:

§ 3518. Effect on existing laws and regulations

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

* * * *

> (e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

Under this statutory framework, Congress has clearly "subjected" the federal agencies to the power vested in OMB and the Director of OMB to determine whether a collection of information by an agency is "necessary for the proper performance of the functions of the agency." No other construction of Sections 3506(a), 3507(a), 3508 and 3518(a) is possible.

In *USWA III*, the Third Circuit, after reciting only two of the above-quoted statutory provisions (§§ 3504(a) and 3518(e)), held:

> Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either: (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

I. Review Is Necessary To Resolve A Conflict Among The Circuits Over What Constitutes A "Collection Of Information" Under The PRA.

Action Alliance of Sr. Citizens of Philadelphia v. Bowen, 846 F.2d 1449 (D.C. Cir. 1988) involved a challenge to OMB's decision under the old Federal Reports Act to eliminate an HHS requirement that a recipient of federal funds under the Age Discrimination Act complete a written self-evaluation of its compliance under the Act and to make such self-evaluations available

on request to HHS *and the public.* The D.C. Circuit rejected as "pure pettifoggery" appellant's objection that because the recipients were not required to submit their written self-evaluation to an agency that it did not constitute a "collection of information." The D.C. Circuit admonished (846 F.2d at 1453-54):

> Appellants cannot seriously believe that in enacting the Reports Act, Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; *it is the record-keeping and data-gathering that constitute the burden.* Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be *used or be available for use* in the collection of information." (Emphasis in original).

In contrast, the Third Circuit in this case read both the Federal Reports Act and the PRA more narrowly (855 F.2d at 113):

> The [PRA], historically, is a successor to the Federal Reports Act, and like the latter, it is aimed at reducing the burden of paperwork required by the federal government *for its own regulatory or statistical purposes.* (Emphasis supplied).

The Third Circuit purported to sidestep the holding of *Action Alliance* on the grounds that the OSHA regulation at issue[8] did not require the employer to "compile" information but merely to transmit it or disclose it to employees. The PRA is not so narrow and it regulates agency rules which require persons to maintain information for disclosure to members of the public or the

---

[8] Specifically, the requirement that employers at multi-employer workplaces maintain or provide to other employers at the workplace a MSDS for each hazardous chemical. 29 C.F.R. § 1910.1200 (e)(2).

public-at-large. An "information collection request" is defined broadly to include not only report forms and questionnaires but a "collection of information requirement or similar method calling for the collection of information." 44 U.S.C. § 3502(11). The "collection of information" is likewise defined broadly to include "the obtaining or soliciting of facts * * * through the use of * * * identical recordkeeping requirements imposed on ten or more persons * * *" 44 U.S.C. § 3502(4). A "recordkeeping requirement" is a "requirement imposed by an agency on persons to *maintain* specified records." 44 U.S.C. § 3502(17).

Under the foregoing authority, OMB disapproved of only three aspects of the revised HCS. First OMB disapproved of the requirement that employers at multi-employer worksites maintain and exchange among themselves (or maintain at a central depository) the Material Safety Data Sheets (MSDS) on hazardous chemicals. The MSDS required by the HCS to be maintained by all employers is clearly the obtaining of facts through the use of a recordkeeping requirement to maintain specified records. As the underlying OSHA regulation requires:

> (8) The employer shall *maintain* copies of the required material safety data sheets for each hazardous chemical in the work place, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Emphasis supplied).

29 C.F.R. § 1910.1200(g)(8).[9]

Secondly, OMB effectively disapproved of the entire revised HCS insofar as it failed to *expand* the exemptions for consumer products and FDA regulated drugs

---

[9] The rule applicable to multi-employer worksites, 29 C.F.R. § 1910.1200(e)(2)(i) likewise contemplates that employers will maintain MSDS's at their own offices or at a central location in the workplace.

where there were pre-existing, duplicative disclosure requirements. The Third Circuit, overlooking the fact that it is the HCS which calls for the "collection of information," mistakenly confused the issue and concluded that "exemptions from labelling requirements which would otherwise be duplicative" cannot be a "collection of information." *USWA III* at 112. This mistake in perception led the court of appeals to hold that these two OMB disapprovals were improper as well. Since it is the HCS (not the exemption) that constitutes an information collection request, OMB's recommendation of an *expanded exemption* from the information collection requirements of the HCS to avoid duplication in these two instances is properly a "disapproval."

OMB's own regulations implementing the PRA, 5 C.F.R. § 1320, are consistent with the clear reading of the PRA and with the legislative history. As the Senate Report commented, "Information *maintained*, as opposed to directly provided by Federal agencies, is therefore subject to the clearance requirements for collections of information set forth in Section 3507." S. Rep. No. 96-930, 96th Cong., 2d Sess. 38 (1980). Furthermore, both the Senate Report and the House Report confirm that "information is also collected to form the basis for *disclosure to the public*." [10] Thus OMB relies on sound legislative authority when it explains that the "obtaining or soliciting of information" by an agency "includes any requirement or request for persons to *obtain, maintain*, report or *publicly disclose information*." 5 C.F.R. § 1320.7(c) (emphasis supplied). Furthermore, "Requirements by an agency for a person [employer] to obtain [an MSDS from a chemical manufacturer] for the purpose of disclosure to members of the public [employees] through posting, notification, labeling, or similar disclosure requirements constitute the 'collection of informa-

[10] S. Rep. No. 96-930, 96th Cong., 2d Sess. 39-40 (1980). *Accord* H.R. Rep. No. 96-835, 96th Cong., 2d Sess. 23 (1980).

tion' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency." 5 C.F.R. § 1320.7(c)(2). This rule is entirely consistent with the purpose of the PRA "to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information," 44 U.S.C. § 3501(2), insofar as OMB has determined that the collection, maintenance, and dissemination of information is more efficiently handled by private persons instead of the Government itself.

Both the express language of the PRA and the OMB regulations promulgated thereunder do not limit the PRA's scope to some narrow version of the word "compile" for the government's own regulatory or statistical purposes. In taking that narrow course, the Third Circuit brought itself squarely into conflict with the D.C. Circuit's view that the "collection of information" encompasses "any general or specific requirement for the . . . maintenance of records . . . which are to be . . . available for use in the collection of information." *Action Alliance, supra* at 1454.[11]

More seriously, the Third Circuit totally ignored this Court's rule for reviewing an agency's construction of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

---

[11] It is not a point of distinction that *Action Alliance* was decided under the Federal Reports Act. The legislative history is unequivocal that the Federal Reports Act was "strengthened" by the PRA, and one "feature of the [PRA] which strengthen[ed]" and "clarified" the Federal Reports Act was to specifically include "recordkeeping requirements" in the definition of "collection of information." S. Rep. No. 96-930 at 13.

> Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). While the intent of Congress in this case is clear and OMB has adhered to it, it is equally clear that OMB has engaged in a permissible construction of the PRA. Thus, under this Court's *Chevron* ruling, the Third Circuit has erroneously imposed its own construction on the PRA.

II. Review Is Necessary To Resolve An Issue Of Major Economic Significance Concerning The Authority Of OMB To Reduce The Cost Of Federally-Required Recordkeeping Requirements.

It is an essential observation that OMB's decision under the PRA in this case is based on and articulated *solely* in terms of paperwork burden and practical utility. (Pet. 31a, 34a-35a, 37a).[12] OMB cited examples how the OMB-disapproved provisions were duplicative of other federal information requirements (Pet. 33a, 36a, 37a), and made recommendations about less burdensome alternatives. (Pet. 32a, 42a). One thing is for certain about the OMB decision in this case: on its face there is absolutely nothing to suggest that OMB's decision "embodies substantive policy decision making entrusted to [OSHA]." Indeed, the Third Circuit tacitly acknowledged this fact and concluded, without citing any fact or reason, that OMB had some hidden substantive agenda when it acted in the "guise of reducing paperwork." *USWA III* at 113.

---

[12] References herein to "Pet. ——" are to the Secretary of Labor's petition for certiorari in No. 88-1434, Appendix E.

The court of appeals accused OMB of "second-guessing" OSHA's policymaking, and held that OMB was without authority to do so, citing 44 U.S.C. §§ 3504(a) and 3518 (e), but the Third Circuit's exclusive reference to these provisions of the PRA selectively misinforms the role intended for OMB by Congress.[13] The very language of § 3508 instructing OMB to "determine whether the collection of information is *necessary* for the *proper performance of the functions of the agency*" necessarily means that OMB will have to contemplate the agency's substantive role and functions in assessing whether the collection of information is "necessary." At a minimum, the very word "necessary" envisions that there will be some "second guessing" of an agency's action by OMB. Consequently, the mere fact that OSHA's policymaking in this case concerned the disclosure of information to workers does not remove a disclosure-oriented record-keeping requirement from OMB's jurisdiction. Instead, it is merely one of the factors that OMB might consider in determining whether the collection of information is "necessary."[14] The Senate Report confirms that it was

---

[13] Sections 3504(a) and 3518(e) were two of three "safeguards" incorporated in the PRA to be sure there was no dilution in the independence of agencies. S. Rep. 96-930, 96th Cong., 2d Sess. 15 (1980). Section 3518(e) was simply a statement of belief that "the bill shall not affect in any way the existing authority of * * * OMB with respect to the substantive policies and programs of departments and agencies." *Id.* In the words of the statute, OMB's authority was neither increased nor decreased, but OMB was clearly charged under § 3508 with the authority to determine whether an information collection request was necessary.

[14] The Director of OIRA clearly perceives such a balancing act for her role. "While the Act's underlying goal is to minimize the Federal Paperwork burden on the public, the [PRA] also recognizes the need to weigh the burdens of the collection on the public against the needs of the agency." *Paperwork Act Oversight: Internal Revenue Service Forms W-4 and W-4A, Hearing Before the Subcommittee on Federal Spending, Budget and Accounting, Senate Committee on Governmental Affairs*, S. Hrg. 100-75, 100th Cong., 1st Sess. 30 (1987) (Statement of Wendy L. Gramm).

ultimately the responsibility of the Director of OMB to determine an agency's need:

> *Necessity is thus the test under this section.* This determination is to include whether the collection of information: (1) has practical utility for the agency, (2) is not more than the minimum needed to meet the agency's objective, or (3) is not duplicative of similar information otherwise accessible. *If the Director determines that a collection is not necessary, he should not approve it.* The Director is authorized to give the agency and other interested persons an opportunity to be heard or to submit statements in writing before making a determinaton. *Unless the collection of information is specifically required by statutory law the Director's determination is final for agencies which are not independent regulatory agencies.*

S. Rep. No. 96-930, 96th Cong., 2d Sess. 49 (1980).

Congress knew that it had given significant authority to the Director of OMB under the PRA and it saw itself as the ultimate overseer of the Director's conduct in determining necessity.

> The Congress itself has the responsibility and must ultimately ensure that the authority granted to the Director of OMB by this Act over both Executive branch and independent regulatory agencies and the override authority is not abused. As the history of the original Federal Reports Act demonstrates, the Congress always has the prerogative and capability to change those authorities.

Id. at 16.

At the time it enacted the PRA, Congress was aware that in some cases there would be a "close relationship between policy making and information management." H.R. Rep. No. 835, 96th Cong., 2d Sess. 23 (1980). However, the legislators felt that the agencies should be capable of justifying "their need for information used to

establish policy or for other purposes." *Id.* As a practical matter, OMB demonstrated a certain solicitude for OSHA's needs in this case and suggested further rulemaking by OSHA on the HCS to justify its need for other portions of the HCS. (Pet. 38a-44a). This is hardly a case of "political interference" which concerned some members of Congress and prompted the enactment of the safeguards. It is a classic case of how the PRA was intended to work.

It cannot be ignored that the PRA was enacted for the protection of the public, and in centralizing the clearance process in OMB Congress deliberately modified the practice under the Federal Reports Act in which some agencies were accountable to no one and review was otherwise divided between OMB and the General Accounting Office. Congress deliberately chose to hold one agency accountable to it for achieving the objectives of the PRA. No section of the Act is more revealing of this purpose than Section 3512.[15] Although not directly implicated by the facts in this case, the spirit and intent of Section 3512 is clearly offended by the Third Circuit's ruling. Enacted for the protection of the public, Section 3512 requires that an OMB control number be assigned to each information collection request. That control number is a symbol to the American public "indicating that the Director of OMB is the acountable individual in government to be sure that the information is *needed*, is *not duplicative* of information already collected, and is collected *efficiently*." S. Rep. No. 96-930, 96th Cong., 2d

---

[15] § 3512. **Public protection**

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

Sess. 9 (1980) (emphasis supplied). It is a symbol that the information collection request has been "subjected to the clearance process described by Section 3507." *Id.* The Third Circuit's decision has deprived the public of the meaningfulness of the OMB control number (No. 1218-0072) assigned to the HCS.

In focusing on Sections 3504(a) and 3518(e), and by not addressing the particular language of Sections 3506(a), 3507(a), 3508 and 3518(a), or the spirit of the PRA underlying Section 3512, the Third Circuit ignored this Court's recent command that, "In ascertaining the plain meaning of a statute, the court must look to *the particular statutory language* at issue, *as well as the language and design of the statute as a whole.*" *K mart Corp. v. Cartier, Inc.*, —— U.S. ——, 108 S.Ct. 1811, 1817 (1988) (emphasis supplied). Secondly, the Third Circuit overlooked that Congress has expressly delegated to OMB the power to "promulgate rules necessary to exercise its authority under the PRA." 44 U.S.C. § 3516. Such regulations are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, supra* at 844. In this case, we have two agencies, with their respective spheres of expertise, supporting (1) OMB's power to review under the PRA and (2) OMB's disapprovals in this case. Under this Court's *Chevron* ruling, deference is due the agencies unless it can be shown that OMB's action was "arbitrary or capricious." *Id.* The Third Circuit made no such finding, and if the court of appeals ruling is left unreviewed, a significant part of OMB's paperwork clearance function is effectively gutted, perhaps rendering the legislative goal to reduce paperwork burden unobtainable.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted in *United Steelworkers of America v. Pendergrass.*

Respectfully submitted,

CLARK R. SILCOX *
STEELE & FORNACIARI
2020 K Street, N.W., Suite 850
Washington, D.C. 20006
(202) 887-1779
Attorneys for Business Council on the Reduction of Paperwork

* Counsel of Record